IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DONALD WAYNE THOMAS,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 5293
	:	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Fulton County. Petitioner was convicted of murder and received a death sentence. The Supreme Court affirmed the conviction and sentence. Thomas v. State, 245 Ga. 688 (1980). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey v. Georgia, 446 Ga. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Upon reconsideration the Supreme Court reaffirmed the death sentence. Thomas v. State, Addendum, 247 Ga. 233 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 67 paragraphs, of which 60 allege substantive claims for relief (7-63, 65-67). The Court will address these claims for relief

by paragraphs corresponding numerically to the paragraphs in the amended petition.

The record in this case consists of the transcript of proceedings before this Court on February 11, 1982; the affidavits of Ellen Parks, Jerlene Parks, Larry Joe Swaney, August F. Siemon, and Marjorie Fargo; and the transcript and record of Petitioner's trial in the Fulton Superior Court.

7-9

In paragraphs 7-9, Petitioner claims he was denied his right to effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented by Robert Coker at trial and by Jack Dorsey on appeal.

Mr. Coker was admitted to the Bar in November, 1973. Since May, 1974, he has been with the Fulton Public Defender's Office, handling criminal cases exclusively. Counsel estimated that he has conducted 15-20 jury trials per year. He has also tried 10-15 murder cases. He has also handled 3 death cases, 2 of which, including Petitioner's, he has tried.

After Counsel was appointed, he visited Petitioner at least 10 times, each visit lasting a minimum of 45

minutes or more. He interviewed witnesses, talked to the District Attorney's Office and the Atlanta Homicide Office and saw the latter's file. Petitioner denied any guilt. He gave Counsel an alibi that did not pan out, told him that Linda Cook was lying and that Enzor Lowe was a drunk.

Counsel requested that Petitioner be given a psychiatric examination, and the request was granted. (R. 5). Dr. Lloyd T. Baccus of Grady Memorial Hospital examined Petitioner, found that he was incompetent to stand trial, and recommended he be transferred to an inpatient facility. (R. 6-7). Counsel filed a special plea of insanity. (R. 8). The trial court ordered a second evaluation of Petitioner. Dr. Sheldon B. Cohen was unable to arrive at a diagnosis or determine Petitioner's competency, noting there was conflicting information from the first evaluation at Grady and the one he conducted, and recommended extensive observation at Central State Hospital. (R. 14-15). Pursuant to court order, Petitioner was transferred to the custody of the Department of Human Resources. (R. 13). At Central State Hospital, Petitioner was found competent to stand trail. (R. 16-17). Counsel subsequently visited with Dr. Baccus on the Friday before Petitioner's trial, and Dr. Baccus told him

that he had no insanity defense. Counsel abandoned the special plea because he thought it would be futile to pursue it.

Prior to trial, Counsel filed numerous motions. (R. 8, 18, 22, 29, 32, 33, 35, 36, 38, 39, 49, 55, 56, 68, 71, 73) and requests to charge (R. 96, 115). He testified that the idea to seek a mental competency for either Linda Cook or Enzor Lowe, the chief State's witnesses, never occurred to him. He thought Ms. Cook was a very impeachable witness and Mr. Cook a very weak witness, so he saw no reason for a competency exam.

During the voir dire examination, Counsel testified that he asked the usual questions. His strategy was to try to get an all-black jury if possible. He considered the issue of race in evaluating jurors but did not question jurors on this issue. His usual practice is to refrain from asking such questions to prevent adverse reactions.

At trial, Counsel made an opening statement (T. 344-345); cross-examined witnesses (T. 348; 358; 381; 390; 406; 419; 446; 451; 454; 461; 467; 473); made motions (T. 474; 475; 484; 485; 576); gave closing arguments in the guilt/innocence (T. 514-538) and sentencing (T. 560-565) phases.

Counsel testified that he did not present evidence in mitigation because Petitioner refused to testify and said that he did not want anybody to cry for him. Petitioner's mother left the courtroom

after the verdict and later could not be found. Counsel did not remember why he did not call any psychiatrists, but he thought that he did not call them because the State could have cross-examined them and rebutted their testimony.

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. Mr. Coker was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of material with which to work. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective for not pursuing Petitioner's special plea of insanity. Counsel testified that he abandoned the plea because he thought it would be futile to pursue it since he had no evidence to present. Petitioner has not shown the special plea could have been successful. The Court does not view Counsel's decision as amounting to ineffective assistance.

Petitioner has also claimed Counsel was ineffective for failing to present an insanity defense. Yet, Petitioner has made no showing that Petitioner acted under a delusional compulsion or could not distinguish between right and wrong at the time of the offense. Smith v. State, 245 Ga. 44(1)(1980). Even Petitioner's own witnesses described him as a normal person in the proceedings before this Court. The Court cannot conclude Counsel was ineffective for this reason.

Petitioner has also asserted Counsel was ineffective in the sentencing phase for not presenting evidence as to Petitioner's mental condition. Counsel did not remember why he did not call any psychiatrists, but thought that he did not because the State could cross-examine and rebut their testimony. This tactical decision is within the exclusive province of a lawyer after consulation with his client. Reid v. State, 235 Ga. 378 (1975). Petitioner's own witnesses testified at the habeas hearing that he was a "normal person" and were unaware of any mental problems. Thus, Petitioner has made no showing that such evidence was available. The Court cannot conclude Counsel was ineffective.

Petitioner has also complained of Counsel's failure to request an instruction after the jury asked how soon a person could be released if given a life sentence. (T. 596). The trial court's refusal to comment on the question maintained the neutrality

required by Ga. Code Ann. §27-2206 and, therefore, was proper. Thomas v. State, 240 Ga. 393(6)(1977); Willis v. State, 243 Ga. 185(6)(1979); Tucker v. State, 244 Ga. 721 (1979). The Court does not find Counsel ineffective for not requesting an instruction on something that was not error.

Petitioner's remaining allegations as to what opening argument Counsel should have made, what questions to have asked on voir dire, whether to have requested competency exams for two witnesses, or what issues retained counsel, Jack Dorsey, should have raised on appeal are strategic and tactical decisions which are the lawyer's to make after consultation with his client. Reid v. State, supra. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

Accordingly, this claim for relief is found to be without merit.

9-15

In paragraphs 9-15, Petitioner alleges that the failure of the trial court to conduct a hearing on his special plea of insanity deprived him of his right to due process under the Fourteenth Amendment and Georgia Constitution.

FINDINGS OF FACT

The Supreme Court has already concluded that Petitioner was not put to trial while under an alleged

outstanding order of incompetency. Thomas v. State, 245 Ga. at 692. In so deciding, the Court found as fact that in response to a special plea of insanity, Petitioner was examined by two psychiatrists, who tendered conflicting reports. Id. The trial court ordered that Petitioner be transferred to the custody of the Department of Human Resources in order to be examined by the staff at Central State Hospital. Id. The doctors at Central State found Petitioner competent to stand trial. Id.

Trial counsel testified that on the Friday before trial began, he talked with the first psychiatrist who had examined Petitioner and who had found him incompetent to stand trial. The doctor told Counsel he had no insanity defense. Counsel abandoned the special plea because he thought it would be futile to pursue it.

CONCLUSIONS OF LAW

In Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court held if a defendant has presented evidence to the trial court, before or during trial, that raises a bona fide doubt of his competence to stand trial, that court's failure to make further inquiry into the matter denies the defendant his right to a fair trial. In determining whether a competency hearing is required, three factors should be considered;

the existence of a history of irrational behavior, defendant's demeanor at trial, and prior medical opinion. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 986, 43 L.Ed.2d 103 (1975).

Petitioner has established no history of irrational behavior. Even his witnesses testified before this Court that he had always been a normal person. In addition, he has presented no evidence to indicate his demeanor at trial created any suspicion of mental incompetence. Finally, despite previously conflicting reports, the doctors who examined Petitioner at Central State found him competent to stand trial. (R. 16-17). Counsel then abandoned the special plea because he had no evidence to present and thought it futile to pursue the issue. Thus, Petitioner has raised no bona fide doubt as to his competency and the trial court did not violate Pate through its failure to hold a competency hearing. Chenault v. Stychcombe, 546 F.2d 1191 (5th Cir. 1977).

Accordingly, this allegation is found to be without merit.

16-19

Petitioner's argument that the exclusion for cause of jurors unequivocally opposed to the death penalty violates his right to an impartial jury was rejected in Smith v. Balkcom, 660 F.2d 575 (1981), as well as on appeal, Thomas v. State, 245 Ga. at 690.

20-24

In paragraphs 20-24, Petitioner alleges his Sixth and Fourteenth Amendment rights were violated by the premature exclusion of five jurors under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

FINDINGS OF FACT

The Supreme Court has already decided jurors Thompson (T. 113-115) and Reese (T. 286-288) were properly excluded for cause. Thomas v. State, 245 Ga. at 690. (See Appellant's Brief, p. 7).

The Court has reviewed the voir dire examinations of jurors Ogletree (T. 37-39), Beachum (T. 68-76), and Watkins (T. 77-78).

CONCLUSIONS OF LAW

Under Witherspoon v. Illinois, supra, a juror may be excluded for cause where he indicates he is irrevocably committed to vote against the death penalty before the trial has begun regardless of the facts and circumstances that might emerge during the proceedings.

The Court finds that the trial court did not abuse its discretion in excluding these three jurors for cause, despite some ambiguity in their answers. The trial Judge was in a much better

position to know what a juror was trying to communicate than this Court sitting on habeas corpus review. For this reason, the Court finds no violation of Witherspoon.

Accordingly, this claim for relief is found to be without merit.

25-27

In paragraphs 25-27, Petitioner claims his trial was conducted in such a manner as to deprive him of his right to a fundamentally fair trial under the Fourteenth Amendment and Georgia Constitution. Specifically, he alleges the State did not notify Counsel of its intent to seek the death penalty until the day of trial; that the notice of aggravating circumstances was not served until the day of trial; that Counsel was not permitted to review the statements of State witnesses before the trial; that the prosecutor led two witnesses through their testimony; that the prosecutor ignored the proper limitations on redirect examination; that the prosecutor bolstered the credibility of her own witnesses; that the State called a witness whose full name had not been given to Counsel until the morning of trial; that the trial court admitted irrelevant testimony from Linda Cook; that the trial court erred in denying motions for mistrial based upon two statements from the victim's mother.

FINDINGS OF FACT

Notice of the State's intent to seek the

death penalty and of aggravating circumstances to be relied upon were given to Counsel prior to the beginning of Petitioner's trial. (T. 4-6; R. 75). Counsel testified that the prosecutor had indicated in pre-trial discussions the death penalty would be asked for if the case went to trial. Counsel further stated that it was obvious to him that the (b)(7) aggravating circumstance was the only one that could apply, so the formal notice coming as late as it did made no difference in his preparation.

Counsel was not given access to the statements of State witnesses prior to trial. (T. 11-13). Counsel was given copies of their statements as they were called. Id.

During the examination of Linda Cook and Enzor Lowe by the prosecutor, Counsel objected numerous times to the prosecutor leading her own witnesses. (T. 353; 354; 376; 378; 379; 386; 396). These objections were ruled upon. Id.

Counsel objected to the prosecutor calling a witness named Roosevelt because Counsel had been given only his first name, no last name or address, on the list of witnesses. (T. 426). The prosecutor stated that she only learned his last name and address from her other witnesses, had him brought to court that morning, and summarized his testimony. (T. 426-427). The trial court recessed to allow Counsel to talk with the witness. (T. 427-429). The

witness, Roosevelt Tysinger, was an eleven-year-old friend of the victim and testified as to when he had last seen the victim. (T. 458-462).

On cross-examination, Counsel asked Linda Cook how she and Petitioner were getting along at the time of the incident and whether they were fighting a lot. (T. 373). Counsel testified that he tried to bring out her resentment against Petitioner on cross-examination. On redirect exam, the prosecutor elicited the fact that Petitioner had kept Ms. Cook locked up for a week in his room at a rooming house. (T. 375-376).

On direct examination, the victim's mother said, "She [Linda Cook] was scared of Donnie Wayne Thomas." (T. 471). The trial court immediately instructed the witness to answer questions precisely and instructed the jury to disregard that testimony. (T. 471-472). On cross-examination, the same witness answered, "First time I met her was two weeks before Donnie Thomas killed my son, or before somebody killed him." (T. 473). The trial court immediately instructed the jury to disregard the testimony and sent the jury out of the courtroom. Id. Counsel moved for a mistrial based on the two statements, but the motions were denied. (T. 474-475). The trial court had the jury brought back in and instructed them at length to disregard the comments. (T. 475-477).

CONCLUSIONS OF LAW

Counsel received "clear notice" of the State's

intent to seek the death penalty in pre-trial discussions with the prosecutor, and such notice is sufficient. Bowden v. Zant, 244 Ga. 260, 263 (1979). Further, the formal written notice, given on the morning before trial, coupled with the previous informal notice is sufficient under Franklin v. State, 245 Ga. 141, 149 (1980).

Statements of witnesses in the prosecutor's file are not subject to a notice to produce, though exculpatory statements from witnesses are subject to disclosure. Wilson v. State, 246 Ga. 62, 65 (1980). Petitioner has not shown there were exculpatory statements which the prosecutor failed to disclose. Thus, the Court finds that the procedure followed in this case of furnishing copies of witnesses' statements to defense counsel as the witnesses were called did not violate his right to a fair trial.

As to Petitioner's complaint that the prosecutor led her own witnesses, the record indicates that defense counsel made objections, and the objections were ruled upon. The Court finds there is no error of which to complain.

Petitioner has also claimed the prosecutor exceeded the scope of permissible redirect examination but has not cited any examples of such. The Court has examined the redirect examination of witnesses by the prosecutor and found nothing improper. The

conduct and extent of redirect examination which follows and is intended to neutralize the effect of cross-examination is left to the sound discretion of the trial court. Morgan v. State, 240 Ga. 845 (1978). Petitioner has shown no abuse of discretion.

Petitioner's allegation that the district attorney bolstered the credibility of her witnesses is completely without merit.

Petitioner has also objected to the State's calling of Roosevelt Tysinger because Counsel did not obtain his last name until the morning the witness testified. The prosecutor stated that Roosevelt's last name and address were newly discovered. (T. 426-427). The trial court recessed to allow defense counsel to interview the witness. Such action by the trial court was permissible. Lakes v. State, 244 Ga. 217 (1979).

The testimony of Linda Cook regarding the fact that Petitioner had kept her locked in his room in a rooming house was elicited by the prosecution on redirect exam after defense counsel had inquired into her relationship with Petitioner and challenged her veracity. The evidence was relevant and admissible on redirect examination. Morgan v. State, supra.

Finally, Petitioner has complained of the trial court's denial of two motions for mistrial based upon voluntary comments by the victim's mother during her testimony. The record reflects the trial judge acted immediately and instructed

the jury to disregard that testimony. Thus, Petitioner has shown no abuse of discretion in the denial of the motions for mistrial. Avery v. State, 209 Ga. 116 (1952); Moore v. State, 228 Ga. 662(4) (1972); Shy v. State, 234 Ga. 816, 824 (1975).

28-30

In paragraphs 28-30, Petitioner asserts that the prosecutor made improper closing arguments during the guilt/innocence phase of trial, which violated his constitutional rights. Specifically, Petitioner complains of the prosecutor's reference to the fact that Petitioner's girlfriend had been locked up in his boarding house room and of the prosecutor's suggestion of motive for the crime.

FINDINGS OF FACT

The Court has examined the closing argument of the prosecutor, (T. 505-514), particularly the portion of which Petitioner complains (T. 510). Following the prosecutor's suggestion of motive, defense counsel objected. Id. The trial court gave a cautionary instruction and overruled the objection. Id.

CONCLUSIONS OF LAW

The Court has concluded that evidence of Petitioner's girlfriend being locked in his room was relevant and admissible. (See paragraphs 25-27). Therefore, the prosecutor's reference to this fact

was not improper.

The prosecutor's suggestion of motive was one inference that could be drawn from the evidence and not an improper reference to facts not in evidence. Wheeler v. State, 220 Ga. 535, 537 (1965); Shy v. State, supra; Garcia v. State, 240 Ga. 796, 800 (1978).

Accordingly, this claim for relief is found to be without merit.

31-32

In paragraphs 31-32, Petitioner charges that the failure to record bench conferences deprived him of his Sixth and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Counsel testified that nothing happened of significance at bench conferences.

CONCLUSIONS OF LAW

The court reporter's failure to transcribe all bench conferences in a death penalty case does not constitute reversible error per se where the appellant does not demonstrate any harm or prejudice resulting therefrom. Davis v. State, 242 Ga. 901 (1979). Petitioner has made no such showing.

Accordingly, this allegation is without merit.

33-34

In paragraphs 33-34, Petitioner alleges that the introduction into evidence of his prior convictions

in the sentencing phase violated his Eighth and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

Counsel filed a Motion in Limine to prohibit the introduction of Petitioner's prior convictions. (R. 36). The prosecutor stated that she did not intend to introduce them in the case-in-chief unless Petitioner placed his character in issue. (T. 9-10).

Prior to the beginning of the sentencing phase, the trial court conducted a hearing outside the presence of the jury on the admissibility of Petitioner's prior convictions. (T. 551-555). The trial court found the convictions were admissible. Id.

CONCLUSIONS OF LAW

Prior convictions are admissible in the pre-sentence hearing in capital cases under Ga. Code Ann. §27-2503, provided the State has given notice to the defendant of its intent to use the prior convictions as evidence. Corn v. Hopper, 244 Ga. 28 (1979); Fair v. State, 245 Ga. 868, 873-74 (1980).

Here, the record does not indicate whether Petitioner was given formal, written notice of the State's intent to introduce the prior convictions, but the statute does not require formal, written

notice. Cf. Ga. Code Ann. §27-2503. Clear notice is all that is required. Hewell v. State, 238 Ga. 578, 580 (1977); Bowden v. Zant, supra, at 263. It is readily apparent that defense counsel for Petitioner was aware of the prior convictions since he filed a motion in limine to bar their introduction.

Accordingly, this claim for relief is found to be without merit.

35-38

In paragraphs 35-38, Petitioner claims that the jury instruction on malice in the guilt/innocence phase was impermissibly burden-shifting under Sandstrom.[1]

FINDINGS OF FACT

The Court has examined the jury instruction on malice. (T. 504).

CONCLUSIONS OF LAW

Petitioner's argument that the statutory definition of malice murder is burden-shifting was rejected in Burney v. State, 244 Ga. 33, 39 (197(), and Franklin v. State, 245 Ga. 141(9)(1980).

Accordingly, this allegation is found to be without merit.

---

[1] Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

39-45

In paragraphs 39-45, Petitioner alleges that the jury instructions in the sentencing phase failed to guide the jury as to the proper application of the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance and as to mitigating circumstances.

FINDINGS OF FACT

The Supreme Court expressly upheld the finding of the (b)(7) aggravating circumstance. Thomas v. State, Addendum, 247 Ga. at 234. Implicit in this finding is the conclusion that the jury charge sufficiently channeled the jury's discretion because the Court noted, "Speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review." Id.

The trial court instructed the jury to consider "any evidence of mitigating circumstances" in arriving at its verdict as to sentence, that they were not required to recommend death even if they found an aggravating circumstance to exist, and that the sentence to be imposed was a matter entirely within the jury's discretion so that they could recommend a life sentence "for any reason that is satisfactory to you, or without any reason, if you care to do so." (T. 567-568).

CONCLUSIONS OF LAW

The jury received clear instructions on mitigating circumstances and the option to recommend against death, comporting with Spivey v. Zant, 661 F. 2d 464 (1981).

Accordingly, this claim for relief is found to be without merit.

46-49

Contrary to Petitioner's assertion, the Supreme Court has already concluded the (b)(7) aggravating circumstance was properly applied. Thomas v. State, Addendum, 247 Ga. at 234.

56-57

Petitioner has not shown his death sentence was the result of intentional discrimination in order to establish his allegation that the death penalty is being discriminatorily imposed on the basis of race, sex, and poverty. Smith v. Balkcom, 660 F.2d 573 (1981).

58-61

Petitioner's argument that the Georgia capital sentencing review procedure is constitutionally defective was rejected in Smith v. Balkcom, supra.

62-63

Petitioner's challenge to the use of electrocution as the means of execution is without merit.

WHEREFORE, all allegations in the amended petition having been found to be without merit, the petition, as amended, is denied.

This 8 day of March, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 2037

SUPREME COURT OF GEORGIA

ATLANTA, June 2, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DONALD WAYNE THOMAS V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Weltner, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Grady Memorial Hospital

June 4, 1979

80 Butler Street, SE, Atlanta, Georgia 30303, Telephone 404 659-1212

In cal 6-25

The Honorable Charles L. Weltner, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
136 Pryor Street, SW
Atlanta, Georgia 30303

Re: Mr. Donald Wayne Thomas

Dear Judge Weltner:

Mr. Donald Wayne Thomas, Indictment #A-44518, was evaluated on June 1, 1979 pursuant to a court order received on May 23, 1979. The following comments reflect a summary of the observations obtained during the course of the interview with Mr. Thomas. There was no additional history or background information available at the time of the evaluation.

PURPOSE OF EVALUATION: Mr. Thomas was informed that the evaluation had been requested by the court and that a summary of observations would be forwarded to the court for its potential use in the disposition of his case. In response to a question regarding his understanding of the charges against him, he stated "I turned myself in on an assault case and they came out here and said I killed a little white boy."

MENTAL STATUS EXAMINATION: Mr. Thomas presented as an alert, rather slender black male dressed in an institutional green jumpsuit, unkempt in his appearance and exhibiting poor personal hygiene. He sat rigidly in his chair staring past the examiner and demonstrated little spontaneity in response to questions. He stated that he had no idea of the month or the day and when asked the year he acknowledged his identity and stated that "I'm in the jail, big rock jail in Atlanta." His speech was characterized by tangential to loose associations, however, he denied experiencing delusional ideations and/or perceptual distortions in the form of either auditory of visual hallucinations. His affect was markedly flattened and his mood was depressed, without evidence of overt suicidal or homicidal ideation. As the interview progressed, and he was questioned more closely regarding his current mental status, he became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands. His objective judgment was determined to be significantly impaired as a result of his markedly inappropriate behavior. His insight was considered to be nil. As a result of his inability to respond to questioning, the clinical interview was terminated.

I was unable to elicit any substantial family or personal history as a result of his mental status, however the above noted observations are clearly indicative of a diagnosis of Schizophrenia. In the absence of history to the contrary, I must assume that this psychotic behavior is a manifestation of an acute process. Clinical recommendations would include the transfer of Mr. Thomas to an inpatient psychiatric facility in the interest of eliminating his psychotic symptoms. He was placed on Thorazine

FILED IN OFFICE
JUN 1 3 1979
CLERK SUPERIOR COURT
COUNTY GEORGIA

BOOK 861 PAGE 330

50 mgs. twice a day at the close of the interview.

FORENSIC CONSIDERATIONS: Mr. Thomas appeared aware of the charges against him, however as a result of his psychotic state, he did not appear to appreciate his role in the proceedings pending before him nor was he able to communicate effectively with this examiner. It is my impression that Mr. Thomas, as a result of psychotic decompensation, is unable to actively participate in the legal proceedings against him and is so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense.

I am unable to offer an opinion regarding his mental status at the time of the alleged offenses, as his state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense.

Respectfully,

Lloyd T. Baccus, M.D.
Director, Inpatient Psychiatry
Psychiatry & Law Service

LTB:reb

cc: Ms. Carole E. Wall
Asst. District Attorney

Mr. Robert H. Coker
Public Defender

SHELDON B. COHEN, M. D.
604 PEACHTREE MEDICAL BUILDING
401 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30308

Telephone 523-4633

August 8, 1979

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Fulton County Courthouse
Atlanta, Georgia 30303

Re: Donald Wayne Thomas
Indictment No. A-44518

Dear Judge Weltner:

Pursuant to your order of 7 August 1979, Mr. Thomas, who is accused of murder, was seen in psychiatric consultation to determine his capacity to cooperate meaningfully with counsel and to stand trial.

Mr. Thomas was brought to my office ahead of time by two Sheriff's deputies. He sat quietly in the waiting room until I called him. He is a 19 year old, single, Negro male who apparently had been employed regularly as an unskilled laborer in a restaurant for several years.

I explained the purpose of the interview and asked him what he understood it to be and he said, "You are supposed to be a doctor and they say I am crazy, I reckon." However, he said he didn't think he was crazy. He said that he had been in jail for some time, having given himself up "for an assault case." He said that he knew he had done something wrong and he wanted to get it over with.

When asked for details of the assault charges, he said that it was over with, that it was in the past and he did not want to talk about it. When asked about murder charges, he stated that he had been in court on the assault charges and that someone telephoned the court saying that he had committed murder, that they went out and looked for the body and found it. He said the call must have been from someone who did not like him and that he did not have anything to do with this incident, that he had been in jail at the time. He continually denied knowing anything about the murder of a nine year old white boy and strongly implied that many of his difficulties were because his ex-girl friend, Linda Cook, was angry with him and would do anything to hurt him. He said this was because of urinary incontinence present for seven years and that she and others made fun of him because of this.

He was able to give me fundamental, historical information about his mother, four brothers and his work history.

During the interview he was at times angry, negativistic and provocative; for example, smoking a cigaret in the waiting room despite a sign on the door asking people to not smoke. He initially seemed to be pretending not to understand or comprehend anything that was asked of him; for example, when asked if he would like a Coca-Cola or coffee, he looked up and said, "What is that?" Later, as he began talking and became less defensive it was quite apparent that he was very much aware of such phenomenon and he asked if he could have a piece of candy which he noted in a jar in my office.

The interview conducted by Dr. Baccus in early June showed apparently quite different behavior, so that he seemed unresponsive to simple, every day questions. He apparently was placed on a tranquilizer (Thorazene 100 mgs. daily) and this may account for the difference in manner and behavior at this time. It is of course also possible that he may have simulated more in the previous interview than he did today.

At this time I cannot arrive at either a definitive diagnosis or answer the questions as to his mental capacity to assist in his own defense and to stand trial. There is conflicting information from the Grady interview and that which I obtained today. Consequently, I would recommend extended observation at Central State Hospital in order to clarify these factors.

Thanking you for asking me to see Mr. Thomas, I am

Sincerely,

Sheldon B. Cohen

Sheldon B. Cohen, M. D.

SBC:hcm
Encl.

FORENSIC SERVICES DIVISION

CENTRAL STATE HOSPITAL

Milledgeville, Georgia 31062

September 24, 1979

(912) 453-4381

A 44518

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Courthouse
Atlanta, Georgia 30303

Re: Thomas, Donald Wayne
Case No. 228,112
Fulton County
Binion 2 South

Dear Judge Weltner:

Mr. Donald Wayne Thomas was admitted to the Forensic Services Division of Central State Hospital on August 27, 1979 by Order of your Court. We understand that he is charged with Murder. Your Order states that the defendant may be presently incompetent to participate in his defense and that because of conflicting reports from two other psychiatrists, further evaluation by the court is requested.

The physical examination was unremarkable. Neurological examination including brain scan, skull series, electroencephalogram and neurological consultation are all within normal limits. All routine laboratory procedures were within normal limits. The chest x-ray was negative. Although Mr. Thomas has had vague urinary complaints, his urinalysis has been within normal limits.

On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process. Based on our examination, evaluation, and information available to us, he has been given the diagnosis of Latent Schizophrenia. He gives no other history of psychiatric treatment.

Based on our examination and evaluation, we have concluded that he is aware of the charge pending against him and the possible consequences. He is able to relate to his attorney in the preparation of his defense. Therefore, we consider him competent to stand trial.

FILED IN OFFICE

SEP 27 1979

DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BOOK 887 PAGE 33

As to his degree of criminal responsibility, it is our opinion that he is able to distinguish between right and wrong, and was not acting und the influence of a compulsive delusion which overmastered his will to resist committing the alleged offense.

Please send a duly authorized person for him at your earliest convenience.

Very truly yours,

Jose M. Delaterre, M.D.
Medical Director
Forensic Services Division

JMD:id

cc: Honorable Lewis R. Slaton (Enclosed)
Defense Counsel (Enclosed)

[INSTRUCTIONS PRIOR TO PENALTY PHASE OF TRIAL:]

THE COURT: Members of the jury, it is my duty as the Presiding Judge to instruct you now as to the law governing the sentencing phase of this case. The instructions given you earlier in this case and the rules of law outlined to you in this portion of the instructions apply also to your deliberations as to penalty.

The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.

In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

Such a circumstance is defined as a

statutory aggravated circumstance under the law of this state.

Members of the jury, you have found this defendant guilty of the offense of murder, and you may recommend one of two sentences as punishment, if you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State. If you do so find, you may recommend that this defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt," and you must set forth in writing the aggravated circumstances which you find to exist.

If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this state is electrocution.

The other punishment which you may recommend in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this defendant should be put to death, you would return a verdict as follows:

"We recommend life." The effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Members of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstances in this case, which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized, under these circumstances, to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion, and you may provide for a life sentence for this accused for any reason that is satisfactory to you, or without any reason, if you care to do so.

The law vests the exclusive right with the jury to either make or withhold a

recommendation for the death sentence.

Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding the death penalty cannot be imposed. In that event, your verdict would be, "We recommend life," the effect of which would be that the Court would sentence this defendant to life in prison.

The law requires that the Presiding Judge give to the jury certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will give you this written charge.

Now, Ladies and Gentlemen, in the event that you recommend the death penalty in this case, you must write out the recommendation of your findings as to any statutory aggravated circumstances in the form which I have given

to you in these instructions.

Your verdict must be unanimous; that is, agreed to by all 12 of your members. It must be in writing, dated, and signed by your foreman.

You may retired to consider your verdict. The alternates will kindly stand aside.

(Whereupon the jury retired to the jury room, at 4:20 p.m.)

THE COURT: Any exceptions?

MS. WALL: I have none, Your Honor.

MR. COKER: Your Honor, at this time, Your Honor, however, I would specifically reserve any objections.

THE COURT: I see. All right. Any exceptions are, of course, reserved.

Do you want to look at that?

MR. COKER: Okay.

(At 5:44 p.m. the following transpired.)

THE COURT: Now, for the record, it being about 5:45 p.m., I have this question. "May you advise us the soonest a person can be released if given a life sentence?" I propose to answer that as follows: "I am not permitted to answer this question. Signed."

82-5328

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD WAYNE THOMAS
Petitioner,

-against-

WALTER D. ZANT, Superintendent
Georgia Diagnostic and
Classification Center,
Respondent.

MOTION TO PROCEED IN FORMA PAUPEIS

Petitioner, Donald Wayne Thomas, through counsel, respectfully moves this Court for leave to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

In support of his motion, petitioner states as follows:

1. The petitioner is incarcerated on death row in Jackson, Georgia. He has been incarcerated since April, 1979, and during the period of his incarceration he has not had any income from any source. Petitioner's affidavit in support of this motion is appended hereto.

2. Petitioner's application to proceed in forma pauperis in the court below was granted by the Superior Court of Butts County. Petitioner was represented in the court below and is represented in this Court by volunteer counsel on a pro bono basis.

WHEREFORE, petitioner prays that he be permitted to proceed in forma pauperis in this Court.

Respectfully submitted,

Stephen B. Bright
419 7th Street, N.W., Suite 202
Washington, D.C. 20004
(202)638-4798

Counsel for petitioner

No. 81

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD WAYNE THOMAS,

Petitioner,

-against-

WALTER D. ZANT

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DONALD WAYNE THOMAS being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. Yes____ No ✓

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1979 1,50

[redacted]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes____ No✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None____

MRS ANNIE R. THOMAS. MY MOTHER

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Donald W. Thomas
DONALD WAYNE THOMAS

STATE OF GEORGIA

COUNTY OF BUTTS

SUBSCRIBED AND SWORN TO
before me this the 29 day of July, 1982

Notary Public

My Commission expires:
9-10-83